Filed 5/19/09 In re Lewis CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re DONALD RAY LEWIS, on Habeas Corpus.	H032463 (Santa Clara County Super. Ct. No. 68038)

After Governor Schwarzenegger reversed the Board of Parole Hearings' (Board) decision granting parole to Donald Ray Lewis, Lewis petitioned the superior court for a writ of habeas corpus. The superior court granted Lewis's petition and remanded the matter to the Governor for review. James E. Tilton, Secretary of the California Department of Corrections and Rehabilitation, timely appealed.[1]

After the opening brief was filed in this matter, the California Supreme Court issued two decisions: *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*); relevant to the issues presented in the instant appeal. Those decisions were fully briefed by the parties in the responding and reply briefs.

For the reasons stated below, we conclude that the Governor should conduct a new review of the Board's parole decision. We will therefore remand the matter to the superior court with directions to modify its order granting Lewis's habeas corpus petition.

[1] Pursuant to Penal Code section 1477, the "person having custody of or restraining the person on whose behalf the application [for a writ of habeas corpus] is made," is the proper respondent in habeas proceedings. Since the underlying petition involves a decision by the Governor, however, all future references in this opinion are to the Governor, rather than Secretary Tilton.

The order shall be modified to direct the Governor to vacate his January 26, 2007 parole decision and invite him to conduct a new review of the Board's decision in light of *Lawrence* and *Shaputis*. We will affirm the order as modified.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The commitment offense

The facts underlying the commitment offense are not in dispute. As set forth in the probation report, "[o]n January 7, 1978 at approximately 1:45 p.m., officers of the Santa Clara County Sheriff's Department were advised [that] an unidentified male body had been found by witness Omar Hindiyeh in the middle of a flood control channel in Llagas Creek to the rear of the [witness's] residence at 265 Hindiyeh Lane, San Martin. The deceased, although fully clothed, bore no identification papers except a tattoo, with the inscription, 'Born to Raise Hell,' was visible on his upper right arm. An exhaustive search began to [uncover] the victim's identity. [¶] The autopsy of the unidentified male body . . . revealed the victim suffered three stab wounds to the area over both eyes and also to the neck. Additionally, the victim's skull had been crushed and fractured, possibly by a blunt object. The coroner reported the body was the victim of a homicide and the death occurred approximately three to five days before the discovery. [¶] After an investigation into several possible identities for the victim, including a plea through news media for community support in the investigation, on January 12, 1978, the victim's fingerprints were examined by the California Department of Justice and the victim was declared to be one Allen Charles La Bonte, age 26, with a former listed address of 546 South Lyon, Apt. 546, Santa Ana, California." Lewis was arrested several days later, and during an interview with the investigating officer on January 15, 1978, waived his rights and "admitted fighting with La Bonte after deciding to 'roll' the victim since [Lewis] believed La Bonte possessed a large sum of money." After several punches were thrown, "La Bonte pulled a knife and nicked [Lewis's] right hand. [Lewis] . . . fetched a rock and hit the victim on the side of the head[,] . . . kicked the knife from the victim's hand,

closed his eyes and stabbed the victim several times in an unknown location until he felt the knife lodge in 'something hard.' [Lewis] further stated he stabbed the victim on four to six occasions so that the victim stood up and staggered away."

B. Procedural background

Lewis pleaded guilty to one count each of first degree murder, robbery and vehicle theft, and an enhancement for using a knife was found true for each count. He was sentenced to life in prison with the possibility of parole on the murder charge, and the trial court suspended sentence on the robbery and vehicle theft charges pending completion of the life term.

i. The Board hearing and decision

Following the August 31, 2006 hearing, the Board issued its parole decision finding that Lewis was suitable for parole. We summarize below the evidence considered at the hearing.[2]

a. Lewis's testimony

Lewis discussed the commitment offense at the hearing, admitting that he murdered La Bonte. He explained that he met La Bonte at a club, and they discussed some "partying arrangements," involving purchasing marijuana, cocaine and alcohol. After La Bonte and Lewis went to purchase these items, they began arguing and then fighting. Lewis said, "A weapon was drawn, which was a knife and we got into an altercation. He cut me on my right palm. I picked up a blunt object which was a rock or a two-by-four, as I can recall, both of which I used to defend myself at that time. I did retrieve the weapon, the knife, and stabbed [La Bonte] several times. In my statement that I had made that I stabbed him over seven to eight times but actually the coroner verified that it was three times. It was due mostly because I was, had been smoking

[2] The Board also considered the facts of the commitment offense, as described *ante* at page 2. In the interests of brevity, we will not repeat those facts.

marijuana at that time. I don't use that as a reason why that took place. I wasn't in the right frame of mind." Lewis admitted taking La Bonte's car and leaving him there "without taking it into any consideration to even think about to go and come back and see if he was still alive." Lewis also said that "[La Bonte] was alive when I left and as a result of my actions I am responsible for his demise."

When asked about the robbery charge and Lewis's prior statements that he intended to "roll" La Bonte, Lewis said, "there was a discrepancy, there was an argument between him and I about purchasing the marijuana we actually had purchased, [but] the robbery attempt case [*sic*] after I had taken the vehicle and there was a wallet that was actually in the glove compartment of the car. And that's how the robbery deal came into play." The argument began, according to Lewis, after he and La Bonte had purchased marijuana and there was a disagreement about how much each of them should get. Lewis claimed that it was only after the murder that he thought to rob La Bonte of a large sum of money that La Bonte said he had.

b. Social history, criminal record, parole plans

Lewis was born in 1957, and is the third of four sons. Lewis's father was in the military and his family moved around the United States and overseas. Lewis's mother died from a tumor when Lewis was nine years old, and his father subsequently remarried. When his father served a two-year tour of duty in Vietnam, Lewis and his brothers lived with their grandparents.

At the time of the 2005 psychosocial assessment, Lewis was married to his fourth wife, with whom he has adopted five children. He has two biological children, but has no relationship with them or his ex-wives. While in prison, he has maintained close ties with his brothers, his current wife and his adopted children.

Lewis began using marijuana when he was 11 years old and used it regularly for 17 years. He began drinking alcohol at 15 and drank daily.

As a teenager, Lewis was arrested twice for battery, and was made a ward of the juvenile court in 1973. That same year, Lewis was sent to a boys' ranch for six months after punching his school's principal and breaking his nose. Lewis also had two juvenile adjudications in 1974 for being beyond control and for being a runaway. In 1975, Lewis was an accessory to a robbery and was sentenced to a term in the California Youth Authority. Lewis was 20 years old and on parole for the 1975 robbery at the time he murdered La Bonte.

If paroled, Lewis intended to live with his wife, who is a church minister, and their five adopted children. Lewis had a job offer from the president of a nonprofit organization setting up workshops on substance abuse and domestic violence, which is similar to the work he did as a clerk in the prison's substance abuse program. In addition, Lewis had an opportunity to volunteer as a peer counselor in a youth ministry program at his wife's church.

Lewis also made plans with aftercare services to ease his transition back into society, and had obtained a letter from Center Point program staff regarding his eligibility for placement in Center Point's six-month residential aftercare program. He had been interviewed by the Delancey Street substance abuse program, though he had not received a letter of acceptance from Delancey Street at the time of the parole hearing.

c. Institutional behavior

During his incarceration, Lewis had eight reports of minor counseling incidents (CDC 128s).[3] The most recent of these was in 1990. Lewis also had nine reports of more serious misconduct (CDC 115s), none of which involved force, violence or threats. Six

[3] Form 128-A, a "Custodial Counseling Chrono," documents incidents of minor inmate misconduct and the counseling provided. (Cal. Code Regs., tit. 15, § 3312, subd. (a)(2).) Misconduct that is believed to be a violation of law or is not minor in nature is reported on CDC Form 115, a Rules Violation Report. (*Id.*, subd. (a)(3).) Hereafter, all undesignated section references and all further references to regulations are to title 15 of the California Code of Regulations.

of the 115s were issued in the 1980s and were for infractions such as possession of contraband and being out of bounds. He has been discipline-free since 1994 when he received two drug-related 115s; one for a positive urine test and one for trafficking marijuana.

In the early 1980s, Lewis was a welder in a prison metal fabrication plant, where he received certificates of recognition for his work. He also received a certificate for his work in the industries paint shop in 1983. Over the years, Lewis has had numerous skilled labor assignments, working in the plumbing shop, as an upholsterer and as an accounting clerk. Until he could no longer afford the books, he was taking community college courses as well. At the time of the 2006 hearing, Lewis was assigned as a clerk in the prison's substance abuse program, for which he had received excellent reports and laudatory chronos.

During his incarceration, Lewis participated in and completed a number of self-improvement courses. In 1987-1988, he completed group programs in decision making, assertiveness, self-esteem and stress management, while also participating in group psychotherapy. He also participated in Narcotics Anonymous (NA), Alcoholics Anonymous (AA), substance abuse treatment, violence prevention and parenting programs, as well as life skills classes. Though he was not attending NA or AA at the time of the hearing, he was involved in and using materials from the substance abuse program where he was assigned as a clerk. In the year prior to the hearing, Lewis was involved in various rehabilitative programs, completing a relationship awareness workshop program, a course in life skills and a 12-week advanced anger management course. He acted as a facilitator for a program called 40 Days of Purpose, which involved extensive self-reflection, and was involved in the prison's men's advisory committee acting as a representative for his housing unit.

d. Psychological evaluation

At Lewis's 2006 hearing, the Board reviewed a January 2005 psychological evaluation. The evaluation noted that Lewis had been diagnosed with characteristics of an antisocial personality disorder, with a history of significant substance abuse. However, the evaluator noted that, while incarcerated, Lewis had made the appropriate personal, social and behavioral adjustments, upgraded educationally and vocationally and developed impulse control consistent with other citizens in the community. As a consequence, Lewis's risk of dangerousness was rated as lower than that of the average inmate and average for the community at large.

ii. The Governor's decision

In his decision dated January 25, 2007, the Governor reversed the Board's decision to release Lewis on parole. The Governor concluded that Lewis's release from prison would "pose an unreasonable public-safety [*sic*] risk," based on the circumstances of the commitment offense, his inconsistency in discussing the circumstances of the offense, evidence that he may not truly accept responsibility for the crime, and his prior criminal record.

Regarding the commitment offense, the Governor stated that "the first degree murder for which Mr. Lewis was convicted was especially atrocious, because his actions--stabbing Mr. La Bonte three times in the face and neck, crushing and fracturing his skull, and then driving off in Mr. La Bonte's car and going to his motel room to take his things--demonstrated an exceptionally callous disregard for Mr. La Bonte's suffering and life. The gravity of the first-degree murder committed by Mr. Lewis is alone sufficient for me to conclude presently that his release from prison would pose an unreasonable public-safety [*sic*] risk."

The Governor then outlined Lewis's "inconsistent" statements regarding the commitment offense. Specifically, "according to the probation report, Mr. Lewis told police he decided to 'roll' Mr. La Bonte on the night of the murder, believing he

possessed a large sum of money. But in 1988, according to the Category X Diagnostic Unit Evaluation, Mr. Lewis said that Mr. La Bonte had been his cocaine supplier for more than six months prior to the murder and, on the night of the murder, they argued and fought after Mr. Lewis confronted Mr. La Bonte about the poor quality of the drug. In 2006, Mr. Lewis told the Board that he first met Mr. La Bonte the day of the murder. They purchased marijuana together, and argued and fought over the division of the drug."

In addition, the Governor noted that there was evidence which tended to suggest that Lewis might not accept responsibility for the crime. "[A]ccording to the probation report, '[Mr. Lewis] basically denied murdering [Mr. La Bonte] but he feels he must take responsibility for the crime in order to protect his common-law wife and two children.' Mr. Lewis told the probation officer that he watched two other individuals kill Mr. La Bonte. He subsequently told his 1998 mental-health evaluator that 'two other individuals' were involved, and 'if he would have testified against them, . . . he certainly would have been killed and his wife and children would have . . . been killed also.' In addition, Mr. Lewis 'hope[d]' that his original defense attorney would attend the parole consideration hearing, 'so that the true facts of the case could be presented.' When the 2002 Board asked Mr. Lewis if he believed, 'after the injuries that [he] caused [Mr. La Bonte], that somebody came and caused him more injury,' Mr. Lewis responded, 'I don't--I don't think so.' But he also said, 'there's a possible theory there.' "

With respect to Lewis's juvenile and adult criminal record, the Governor stated, "Mr. Lewis was 20 years old when he committed the life offense. The Cumulative Case Summary noted that his 'background is quite assaultive in nature.' Indeed, according to a memorandum to the sentencing court from the Deputy Probation Officer, Mr. Lewis' juvenile record includes an adjudication for battery at age 15, for which he was made a ward of the court. He was later adjudicated for battery, being out of control, and being a runaway. As an adult, Mr. Lewis pled guilty to robbery. He told the 2006 Board that an 'associate' entered the convenience store and took some wine. 'And as a result it was a

robbery.' But according to the April 22, 1976 probation report, Mr. Lewis removed money from the cash register of a convenience store while his crime partner held the store clerk at gunpoint. He was committed to the California Youth Authority for this offense. He paroled approximately one year later, and was on parole at the time of the life offense. In addition, Mr. Lewis admitted to his 2005 mental-health evaluator that he used marijuana and cocaine prior to the life offense. Mr. Lewis' criminal history, which includes incidents of violent and aggressive behavior, suggests an inability or unwillingness to conform his conduct to the rules of free society and this weighs against his parole suitability at this time."

The Governor also noted that Lewis had been disciplined nine times for rules violations "involving marijuana trafficking, testing positive for marijuana and possessing money, among other things." He did not specifically note that Lewis had been discipline-free since 1994.

The positive factors considered by the Governor included Lewis's "efforts in prison to enhance his ability to function within the law upon release," such as "vocational training in office services and related technology, and in upholstery work." The Governor indicated that Lewis had held many institutional jobs, and "availed himself of an array of self-help and therapy, including Alcoholics Anonymous, Narcotics Anonymous, Alternatives to Violence, Parenting Education Program, Category X, Category T, Lifers Group, Men's Advisory Council, Substance Abuse Program, Stress Management, Gavel Club, Life Skills, Breaking Barriers, Relationship Awareness Program, Lifer's Forum, Logo-Mentoring, Process Oriented Non-Directive Psychotherapy, Assertiveness/Self-Esteem Group, and the Reality and Decision-Making Group."

Finally, the Governor noted that Lewis "maintains seemingly solid relationships and close ties with supportive family and friends, and he received favorable evaluations from various correctional and mental-health professionals over the years."

In conclusion, the Governor acknowledged that Lewis, age 49, "made some creditable gains" during his nearly 30 years in prison, but "after carefully considering the very same factors the Board must consider," found "that the negative factors weighing against Mr. Lewis' parole suitability presently outweigh the positive ones."

iii. Habeas proceedings

On July 24, 2007, Lewis filed a petition for writ of habeas corpus in the Santa Clara County Superior Court. The superior court issued an order to show cause on the petition, pursuant to which the Attorney General filed a return and Lewis filed a traverse. On December 26, 2007, the superior court granted the petition and reinstated the Board's decision granting parole, giving the Governor 30 days to conduct a new review if desired. In its order, the superior court indicated that, in any such review, the Governor must explain the "nexus" between "any fact the Governor invokes as a reason to deny parole" and the "question of present 'public safety.' "

The Governor timely appealed, and petitioned for a writ of supersedeas pending resolution of the appeal. We denied the petition for writ of supersedeas by written order dated January 15, 2008. We have been advised that the Governor did not conduct another review of the Board's decision, and Lewis was paroled on February 2, 2008.

II. DISCUSSION

A. The statutory and regulatory framework for parole hearings

"The applicable statutes provide that the Board is the administrative agency within the executive branch that generally is authorized to grant parole and set release dates. ([Pen. Code,] §§ 3040, 5075 et seq.) The Board's parole decisions are governed by [Penal Code] section 3041 and title 15, section 2281[4] of the California Code of

[4] Where, as here, the commitment offense of murder took place prior to November 8, 1978, Regulations section 2281 governs parole suitability, while Regulations section 2402 "provides parole consideration criteria and guidelines for murders committed on or (continued)

Regulations (Regs., § 2230 et seq.). Pursuant to statute, the Board 'shall normally set a parole release date' one year prior to the inmate's minimum eligible parole release date, and shall set the date 'in a manner that will provide uniform terms for offenses of similar gravity and magnitude *in respect to their threat to the public* . . . .' ([Pen. Code,] § 3041, subd. (a), italics added.)" (*Lawrence, supra,* 44 Cal.4th at pp. 1201-1202, fn. omitted.) " 'Accordingly, parole applicants in this state have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation.' " (*Shaputis, supra,* 44 Cal.4th at p. 1258.)

"Subdivision (b) of [Penal Code] section 3041 provides that a release date must be set 'unless [the Board] determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.' " (*Lawrence, supra*, 44 Cal.4th at p. 1202, italics omitted.) "Title 15, Section 2281 of the California Code of Regulations sets forth the factors to be considered by the Board in carrying out the mandate of the statute. The regulation is designed to guide the Board's assessment of whether the inmate poses 'an unreasonable risk of danger to society if released from prison,' and thus whether he or she is suitable for parole. (Regs., § 2281, subd. (a).)" (*Ibid.*)

In determining whether the prisoner is suitable for release, the Board considers the circumstances which tend to show that particular inmate's unsuitability for parole as well as the circumstances which tend to show the inmate's suitability for parole. Circumstances tending to show unsuitability include the following: that the inmate

---

after November 8, 1978. The two sections are identical." (*Lawrence, supra,* 44 Cal.4th at pp. 1201-1202, fn. 5.)

committed the offense in "an especially heinous, atrocious or cruel manner"; the inmate possesses a previous record of violence; the inmate has an unstable social history; the inmate has previously sexually assaulted another individual in a sadistic manner; the inmate has a lengthy history of severe mental problems related to the offense; and the inmate has engaged in serious misconduct while in prison. (Regs., § 2281, subd. (c)(1)-(6).)

The "[f]actors that support a finding that the prisoner committed the offense in an especially heinous, atrocious, or cruel manner include the following: (A) multiple victims were attacked, injured, or killed in the same or separate incidents; (B) the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; (C) the victim was abused, defiled, or mutilated during or after the offense; (D) the offense was carried out in a manner that demonstrates an exceptionally callous disregard for human suffering; and (E) the motive for the crime is inexplicable or very trivial in relation to the offense." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 653, fn. 11; Regs., § 2281, subd. (c)(1).)

Pertinent factors tending to demonstrate suitability for parole are, as follows: the lack of a criminal record or history of committing crimes as a juvenile; a stable social history; acts demonstrating that the prisoner "understands the nature and magnitude of the offense"; the inmate lacks any significant history of violent crime; the inmate has realistic plans for the future; and the inmate has participated in institutional activities that "indicate an enhanced ability to function within the law upon release." (Regs., § 2281, subd. (d)(1)-(d)(3), (d)(6), (d)(8)-(d)(9).)

"Finally, the regulation explains that the foregoing circumstances 'are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel.' (Regs., § 2281, subds. (c), (d).)" (*Lawrence*, *supra*, 44 Cal.4th at p. 1203.)

B. The Governor's review and decision

"The Governor's power to review a decision of the Board is set forth in article V, section 8, subdivision (b) of the California Constitution."[5] (*Lawrence, supra*, 44 Cal.4th at p. 1203.) "The statutory procedures governing the Governor's review of a parole decision pursuant to California Constitution article V, section 8, subdivision (b), are set forth in Penal Code section 3041.2."[6] (*Lawrence, supra*, at p. 1203, fn. 9.) Under this constitutional and statutory authority, the Governor's parole decision must be based upon the same factors that govern the Board's parole decision. (*Shaputis, supra*, 44 Cal.4th at p. 1258.)

"Although 'the Governor's decision must be based upon the same factors that restrict the Board in rendering its parole decision' [citation], the Governor undertakes an independent, de novo review of the inmate's suitability for parole [citation]. Thus, the Governor has discretion to be 'more stringent or cautious' in determining whether a defendant poses an unreasonable risk to public safety. [Citation.] '[T]he precise manner

---

[5] The California Constitution, article V, section 8, subdivision (b) provides, "No decision of the parole authority of this state with respect to the granting, denial, revocation, or suspension of parole of a person sentenced to an indeterminate term upon conviction of murder shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute. The Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider. The Governor shall report to the Legislature each parole decision affirmed, modified, or reversed, stating the pertinent facts and reasons for the action."

[6] Penal Code section 3041.2 provides, "(a) During the 30 days following the granting, denial, revocation, or suspension by a parole authority of the parole of a person sentenced to an indeterminate prison term based upon a conviction of murder, the Governor, when reviewing the authority's decision pursuant to subdivision (b) of Section 8 of Article V of the Constitution, shall review materials provided by the parole authority. [¶] (b) If the Governor decides to reverse or modify a parole decision of a parole authority pursuant to subdivision (b) of Section 8 of Article V of the Constitution, he or she shall send a written statement to the inmate specifying the reasons for his or her decision."

in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor.' " (*Lawrence, supra,* 44 Cal.4th at p. 1204.)

Despite this broad discretion, the Governor's decision to deny parole due to the aggravated circumstances of the commitment offense must still satisfy due process considerations. (*Lawrence, supra,* 44 Cal.4th at pp. 1204-1205.) As *Lawrence* instructs, "the relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense. This inquiry is, by necessity and statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude." (*Id.* at p. 1221; *Shaputis, supra*, 44 Cal.4th at pp. 1254-1255.) Thus, "the aggravated circumstances of the commitment offense are relevant only insofar as they continue to demonstrate that an inmate currently is dangerous." (*Shaputis, supra*, at p. 1255.)

In short, the Governor, like the Board, must conduct "an individualized assessment of the continuing danger and risk to public safety posed by the inmate. If the Board determines, based upon an evaluation of each of the statutory factors as required by statute, that an inmate remains a danger, it can, and must, decline to set a parole date. The same holds true for the Governor's decision to set aside a decision of the Board." (*Lawrence, supra*, 44 Cal.4th at p. 1227.)

C. The scope and standard of review

Lawrence, supra, 44 Cal.4th 1181 and *Shaputis, supra*, 44 Cal.4th 1241 also set forth the standard of review applicable to a decision by the Board or Governor to deny parole.

"[B]ecause the paramount consideration for both the Board and the Governor under the governing statutes is whether the inmate currently poses a threat to public

safety, and because the inmate's due process interest in parole mandates a meaningful review of a denial-of-parole decision, the proper articulation of the standard of review is whether there exists 'some evidence' that an inmate poses a current threat to public safety, rather than merely some evidence of the existence of a statutory unsuitability factor." (*Shaputis*, *supra*, 44 Cal.4th at p. 1254.)

Thus, "as specified *by statute*, current dangerousness is the fundamental and overriding question for the Board and the Governor. In addition . . . evidence in the record corresponding to both suitability and unsuitability factors--including the facts of the commitment offense, the specific efforts of the inmate toward rehabilitation, and, importantly, the inmate's attitude concerning his or her commission of the crime, as well as the psychological assessments contained in the record--must, by statute, be considered and relied upon by both the Board and the Governor, whose decisions must be supported by some *evidence*, not merely by a hunch or intuition. By reviewing this evidence, a court may determine whether the facts relied upon by the Board or the Governor support the ultimate decision that the inmate remains a threat to public safety." (*Lawrence*, *supra*, 44 Cal.4th at p. 1213.)

Regarding the commitment offense, the Supreme Court further instructed that "although the Board and the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (*Lawrence*, *supra*, 44 Cal.4th at p. 1214.)

Accordingly, where "all of the information in a postconviction record supports the determination that the inmate is rehabilitated and no longer poses a danger to public

safety, and the Governor has neither disputed the petitioner's rehabilitative gains nor, importantly, related the commitment offense to current circumstances or suggested that any further rehabilitation might change the ultimate decision that petitioner remains a danger, mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability." (*Lawrence*, *supra*, 44 Cal.4th at p. 1227.)

The Supreme Court also recognized that "certain conviction offenses may be so 'heinous, atrocious or cruel' that an inmate's due process rights would not be violated if he or she were to be denied parole on the basis that the gravity of the conviction offense establishes current dangerousness. In some cases, such as those in which the inmate has failed to make efforts toward rehabilitation, has continued to engage in criminal conduct postincarceration, or has shown a lack of insight or remorse, the aggravated circumstances of the commitment offense may well continue to provide 'some evidence' of current dangerousness even decades after commission of the offense." (*Lawrence*, *supra*, 44 Cal.4th at p. 1228.)

Therefore, "the Governor does not act arbitrarily or capriciously in reversing a grant of parole when evidence in the record supports the conclusion that the circumstances of the crime continue to be predictive of current dangerousness despite an inmate's discipline-free record during incarceration. . . . [W]here the record also contains evidence demonstrating that the inmate lacks insight into his or her commitment offense or previous acts of violence, even after rehabilitative programming tailored to addressing the issues that led to commission of the offense, the aggravated circumstances of the crime reliably may continue to predict current dangerousness even after many years of incarceration." (*Lawrence*, *supra*, 44 Cal.4th at p. 1228.)

D. The Governor's decision

To evaluate the merits of Lewis's habeas corpus petition, we have carefully reviewed the record pursuant to the direction of the California Supreme Court in *Lawrence*, *supra*, 44 Cal.4th 1181 and *Shaputis*, *supra*, 44 Cal.4th 1241. We conclude that remand is appropriate to allow the Governor an opportunity to conduct a new review of the Board's parole suitability decision.

i. The commitment offense

The pertinent regulations specify that one of the circumstances tending to show unsuitability for parole is where the prisoner committed the offense in an especially heinous, atrocious, or cruel manner. (Regs., § 2281, subd. (c)(1).) Evidence that would support such a finding includes evidence that "[t]he offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering." (*Id*., subd. (c)(1)(D).)

In this case, the Governor stated that the crime was especially atrocious because Lewis not only stabbed the victim in the face and neck several times and fractured the victim's skull, but after doing so, drove the victim's car to the victim's motel room and stole his belongings. Stabbing someone in the face and neck, as well as hitting them on the head with a rock, a two-by-four or both, hard enough to crush the person's skull, then driving off and leaving that person to die demonstrates an exceptionally callous disregard for human suffering.

ii. Juvenile and criminal record

The Governor also cited Lewis's criminal record, which includes "incidents of violent and aggressive behavior," as a reason for reversing the Board. Lewis's juvenile and criminal record is detrimental to his chances for parole in two ways. First, a previous history of violence is a factor tending to demonstrate unsuitability for parole. (Regs., § 2281, subd. (c)(2).) Therefore, Lewis's record, which includes adjudications for violent crime, i.e., battery, and a conviction for armed robbery, provides "some evidence" to

support the application of this unsuitability factor. Second, the *lack* of a juvenile record is a factor tending to demonstrate suitability for parole. (*Id*., subd. (d)(1).) Since Lewis has a juvenile record, the "no juvenile record" suitability factor can never apply to his case.

iii. Inconsistent accounts and failure to take responsibility

The Governor cited Lewis's "inconsistent" discussions of the commitment offense and evidence suggesting he may not actually accept responsibility for the crime. Acts demonstrating that the prisoner "understands the nature and magnitude of the offense" can demonstrate an inmate's suitability for parole. (Regs., § 2281, subd. (d)(3).)

According to the probation report, Lewis told police he intended to "roll" or rob La Bonte. In a category "X" diagnostic unit evaluation, prepared in 1988, Lewis said that the victim had been his cocaine supplier for six months and the argument which led to the murder was over the drug's inferior quality. At the 2006 hearing, Lewis told the Board he first met La Bonte the day of the murder and the fight began when they argued over the division of some marijuana they had purchased together.

The Governor also noted that, while Lewis admitted in 1988 striking La Bonte in the head and stabbing him, "he told his 2002 mental-health evaluator it was 'accidental.' " Lewis also told the probation officer that he watched two other individuals kill La Bonte, but took responsibility to protect his wife and children from harm. In his 1998 mental health evaluation, Lewis again said that two other individuals, a Caucasian and Puerto Rican, actually murdered La Bonte, but had he testified against those persons, he and his wife and children would have been killed.

iv. The Governor's decision fails to explain how the applicable suitability and unsuitability factors interrelate to show that Lewis is a current threat to public safety

As discussed above, "[i]t is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant

circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1212.) The Governor's decision relies on the commitment offense, Lewis's juvenile and criminal record, his inconsistent statements regarding the commitment offense, in addition to the evidence suggesting that he does not take responsibility for the victim's death.

The commitment offense occurred in late December 1977 or early January 1978. Lewis's juvenile and criminal record covers a period from approximately 1972 to his commitment for the instant offense in 1978. It is not clear how these factors, both of which are immutable, "interrelate to support a conclusion of *current* dangerousness to the public." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1212, italics added.)

It is possible that if Lewis exhibited a continued propensity for violent behavior while incarcerated, his history of violence would be relevant to show that he remains a dangerous person. The fact that an inmate has engaged in serious misconduct while in prison is another factor tending to show unsuitability for parole. (Regs., § 2281, subd. (c)(6).) However, while the Governor's decision makes note of Lewis's prison disciplinary history, he did not specifically cite that history as a factor weighing in favor of or against granting parole. Lewis has no record of discipline for violent or assaultive conduct while incarcerated, although he does have several 115s involving drugs, including trafficking marijuana. On the other hand, he received his last 115 in 1994, and had apparently been scrupulously following the rules for the 12 years prior to his Board hearing.

As to the inconsistencies in Lewis's account of the life crime cited by the Governor, those go to Lewis's motive for that crime and how well he knew the victim before the murder. Lewis has consistently admitted beating and stabbing La Bonte. The Governor's decision fails to explain how these varied accounts support his conclusion that Lewis would present a danger to public safety if released.

Finally, though Lewis told a psychological evaluator in 2002 that the killing was "accidental," that statement is not inconsistent with the evidence in the record. Lewis has maintained that La Bonte got up and walked away after Lewis beat and stabbed him, and was therefore alive when Lewis drove off in La Bonte's car. Lewis's other statements, where he implicated two other people in the killing, are more problematic, but the most recent of those statements was apparently made in 1998. In any event, the Governor's decision fails to explain how Lewis's past efforts to disclaim or minimize his responsibility for La Bonte's death operate to support a conclusion that Lewis presents a *current* danger to public safety.

It is unclear whether the Governor would have reached the same conclusion regarding Lewis's parole suitability under the *Lawrence* and *Shaputis* standard, in light of the factors weighing for and against his parole suitability. For these reasons, we conclude that remand is appropriate to provide the Governor with the opportunity to conduct a new review of the Board's parole suitability decision in light of the California Supreme Court's direction in *Lawrence, supra,* 44 Cal.4th 1181 and *Shaputis*, *supra*, 44 Cal.4th 1241 that the Governor must conduct "an individualized assessment of the continuing danger and risk to public safety posed by the inmate" that includes consideration of "all relevant statutory factors . . . ." (*Lawrence*, *supra*, at pp. 1227, 1219; Regs., § 2281, subd. (b).)

III. DISPOSITION

The matter is remanded to the superior court with directions to modify its order granting Lewis's petition for writ of habeas corpus. The order shall be modified to direct the Governor to vacate his January 25, 2007 parole decision and invite him to conduct a new review of the Board's decision in light of the decisions in *In re Lawrence* (2008) 44 Cal.4th 1181 and *In re Shaputis* (2008) 44 Cal.4th 1241. As modified, the order is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.